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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

CATHERINE VENTURA, Plaintiff and Appellant, v. EINSTEIN NOAH RESTAURANT GROUP, INC., Defendant and Respondent.	B228097 (Los Angeles County Super. Ct. No. LC084100)

APPEAL from a judgment of the Superior Court of Los Angeles County. Bert Glennon, Judge. Reversed.

Law Offices of Lee C. Arter, Lee C. Arter and Steven M. Karp for Plaintiff and Appellant.

Pearlman, Borska & Wax, Cheryl M. Simbulan and Mark E. Joseph for Defendant and Respondent.

Catherine Ventura appeals from the judgment entered after a jury found that defendant Einstein Noah Restaurant Group, Inc., was not responsible for injuries Ventura suffered when she was struck by a wind-blown outdoor patio umbrella while dining at one of defendant's restaurants. We reverse because the trial court erred when it refused Ventura's request for a res ipsa loquitur instruction.

DISCUSSION

At around 1:00 p.m. on March 9, 2008, 79-year-old Catherine Ventura and her daughter were seated in the outdoor patio of Noah's Bagels in Woodland Hills when a gust of wind lifted a patio umbrella from its concrete base, causing it to land on Ventura's head.[1] Ventura sued Noah's for negligence, contending that the blow to her head caused a concussion that left her with brain damage that required a continuing need for therapy and living assistance.[2] The trial court refused Ventura's request for a res ipsa loquitur instruction, and the jury found that Noah's had not been negligent.

The evidence showed that the umbrella's canvas canopy extended to a width of more than seven feet, and along with its attached wooden frame, weighed about 10 pounds. The umbrella was attached to a fiberglass pole and, when fully open, was five feet eight and a half inches above the ground. The combined weight of the canopy and pole was 14 pounds. The pole was attached to a 60-pound base and was held in place by a "handwheel" screw that was turned until it pushed hard enough against the pole to secure it. It was undisputed that the umbrella pole came free from its base, and expert witnesses for both parties agreed that it did so because the screw was not tightened at that time.

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[1] When we refer to a specific date from this point on, we mean the year 2008.

[2] Noah's Bagels was owned by defendant Einstein Noah Restaurant Group, Inc., but for ease of reference we will refer to the defendant as Noah's, unless otherwise indicated. Also named as a defendant was Duesenberg-Topanga, LLC, the owner of the shopping center where the Woodland Hills Noah's store was located. Although both the record and the parties are silent on this point, Duesenberg-Topanga did not appear at trial, was not named in the judgment, and is not a party to this appeal.

Jennifer Giammichele, who was the manager of the Woodland Hills Noah's store, was working at another store that day, and had neither direct nor indirect knowledge of what occurred. Instead, she testified about Noah's safety policies and practices concerning the umbrella. Two identical patio umbrellas were set up on March 9. According to Giammichele, Noah's did not have any written policies or instructions concerning the proper set-up and use of the umbrellas. Instead, because the umbrellas were essentially self-explanatory, she recalled being shown how to set them up, which included tightening the screw. She also recalled being told not to set the umbrellas out if it became windy, and to take them down if it became windy after the umbrellas were set up. This is essentially what Giammichele told her employees about handling the umbrellas. According to her, Noah's had no policies or protocols in place for checking that the screw remained tight throughout the day, and the screw would not typically be checked for tightness after the initial set-up unless an employee noticed that the umbrella was swaying in the wind. She could not recall an umbrella being lifted out of its base by a wind gust before Ventura was injured.

Giammichele testified that the umbrellas are sometimes moved around by customers, played with by children, and used by customers to tie up their dogs. However, she also said she did not know whether any such conduct had ever caused the screws to come loose.

Edgar Rivas was working at Noah's when Ventura was injured and testified that it was a very windy day. He had set up the umbrellas in the past, and had been instructed to tighten the screw when he did so. Someone else set up the umbrellas that day, but he did not know who had done so. The assistant manager who was in charge of the store that day did not testify.

Ventura testified that she and her daughter had been sitting at their table for several minutes when, without warning, the umbrella landed on her. She also recalled that there were two teenagers sitting on a nearby wall who had been playing with their cell phones, and that they started to laugh after the umbrella hit her.

Kenneth Solomon, an engineer and forensic scientist with an expertise in accident reconstruction and risk and safety analysis, testified for Ventura. Based on weather data from nearby locations, Solomon learned that there were wind gusts between 18 and 26 miles per hour in the Woodland Hills area on March 9, peaking at around 1:00 p.m., when the accident occurred. After explaining how the wind gusts were able to lift and move the unsecured umbrella, Solomon testified that the accident was caused in part by Noah's failure to have any policies or criteria in place concerning the proper use of the umbrella in windy conditions. According to Solomon, the umbrellas should not have been set up at all that morning because of the high wind gusts. He also faulted Noah's for failing to check that the screws remained tightened throughout the day as the winds persisted.

Mechanical engineer Mack Quan testified for Noah's as an expert in the fields of product design and failure analysis and accident reconstruction. According to Quan, there were wind gusts at around 10:30 a.m. on March 9 that equaled the one that caused the umbrella to hit Ventura a few hours later. Based on that, Quan concluded the umbrella had been properly tightened when first set up because otherwise the earlier strong gust would have blown it loose. Therefore, Quan believed, "Someone loosened the screw."

On cross-examination, Quan was asked to provide the factual basis for his opinion that someone loosened the screw after the umbrella had been properly set up in the morning. Quan said his opinion was based on two things: (1) the fact that the umbrella did not come free when a strong wind gust occurred in the morning, which suggested the umbrella had been properly secured at that time; and (2) Ventura's testimony that teenagers sitting nearby laughed after the accident because Quan did not "know any other reason why they would be laughing." Quan did not believe that Ventura was at fault in any way for the accident.

After both sides had rested, Ventura's lawyer asked the trial court to give the jury a res ipsa loquitur instruction. The trial court refused, because one element of the instruction was the requirement that "absent negligence by the defendant, the accident

would not have happened," and there are "any number of issues with respect to how this could have happened . . . ." According to the trial court, these "different scenarios" were based on testimony concerning the laughing teenagers and that dogs had been tethered to the umbrella pole.

DISCUSSION

1. *The Res Ipsa Loquitur Doctrine*

Res ipsa loquitur – Latin for "the thing speaks for itself" – is a doctrine affecting the burden of producing evidence arising from certain accidents. (Evid. Code, § 646, subd. (b).)[3] Where the doctrine applies, the trier of fact must presume that a proximate cause of the plaintiff's injury was the defendant's negligent conduct, unless the defendant introduces contrary evidence. (*Elcome v. Chin* (2003) 110 Cal.App.4th 310, 316.) In order to invoke this presumption, the plaintiff must introduce substantial evidence of three things: (1) the injury must be one that does not ordinarily happen without someone's negligence; (2) the injury was caused by something in the defendant's exclusive control; and (3) the plaintiff was not contributorily negligent. (*Id.* at pp. 316-317.)

Res ipsa loquitur applies when, in light of past experience, it can be said that an accident was probably the result of someone's negligence and that the defendant is probably the person responsible. (*Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 824.) In making that determination, the courts rely on common knowledge, expert testimony, and the circumstances of the accident that injured the plaintiff. (*Id.* at p. 839 (dis. opn. of Mosk, J.; *Cho v. Kempler* (1960) 177 Cal.App.2d 342, 347-348.)

Section 646 directs the trial court as follows: "(c) If the evidence, or facts otherwise established, would support a res ipsa loquitur presumption and the defendant has introduced evidence which would support a finding that he was not negligent or that any negligence on his part was not a proximate cause of the occurrence, the court may,

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[3] All further section references are to the Evidence Code.

and upon request shall, instruct the jury to the effect that: [¶] (1) If the facts which would give rise to a res ipsa loquitur presumption are found or otherwise established, the jury may draw the inference from such facts that a proximate cause of the occurrence was some negligent conduct on the part of the defendant; and [¶] (2) The jury shall not find that a proximate cause of the occurrence was some negligent conduct on the part of the defendant unless the jury believes, after weighing all the evidence in the case and drawing such inferences therefrom as the jury believes are warranted, that it is more probable than not that the occurrence was caused by some negligent conduct on the part of the defendant."

The California Law Revision Commission comment to section 646 provides four possible scenarios for how this works at trial, depending on the state of the evidence:

> "(1) If the facts giving rise to the presumption are established as a matter of law and the defendant offers no rebuttal evidence, then the court must instruct the jury to find that the accident was caused by the defendant's negligence;
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> "(2) If the facts giving rise to the presumption are established but the defendant introduces evidence that is sufficient to rebut the presumption, then the presumption vanishes. If so, the plaintiff has the burden of producing actual evidence that would show the defendant was negligent and that the negligence was a proximate cause of his injuries. However, upon request, the court must instruct the jury that it can still infer negligence from the facts that gave rise to the presumption.
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> "(3) Where the facts giving rise to the presumption are contested but no rebuttal evidence is introduced by the defendant, the court should instruct the jury to apply the presumption and find the defendant was negligent if it finds that the facts necessary to give rise to the presumption exist.
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> "(4) If the basic facts of the presumption are contested and rebuttal evidence is introduced, then the presumption vanishes. Upon request by the plaintiff, the court must instruct the jury that if it finds by a

preponderance of the evidence that the basic facts exist, then it may infer from those facts that the accident was caused by the defendant's negligence." (§ 646, subd. (c); Cal. Law Revision Com. com., 29B pt. 2 West's Ann. Evid. Code (1995 ed.) foll. § 646, pp. 199-201; *Howe v. Seven Forty Two Co., Inc.* (2010) 189 Cal.App.4th 1155, 1163-1164 (*Howe*).)

2. *The Trial Court Erred By Failing to Give a Res Ipsa Loquitur Instruction*

Noah's contends that we should review the trial court's decision not to give a res ipsa loquitur instruction under the abuse of discretion standard, comparing such rulings to ordinary questions regarding the admissibility of evidence. Noah's is wrong.

Instead, once Ventura asked for the res ipsa loquitur instruction, the trial court was required to give it so long as there was substantial evidence to support it. (*Baumgardner v. Yusuf* (2006) 144 Cal.App.4th 1381, 1388 (*Baumgardner*) [failure to give res ipsa loquitur instruction was prejudicial error].) Whether or not substantial evidence exists is a question of law. (*Smith v. Selma Community Hospital* (2008) 164 Cal.App.4th 1478, 1516.) We must review the evidence most favorably to Ventura's contention that a res ipsa loquitur instruction was warranted. (*Baumgardner*, *supra*, at p. 1388.) However, even if the trial court erred, we will not reverse unless a more favorable verdict was reasonably probable had the instruction been given. (*Ibid.*)

The trial court refused to give the instruction because it believed there were other possible causes of the accident – that other people could have handled the umbrella, causing the screw to come loose – thereby negating the requirement that the accident was one that did not likely occur without the defendant's negligence. The trial court erred.

Whether the screw was loosened by other customers or some teenagers' prank goes to the issue of whether the umbrella was truly under the exclusive control of Noah's. (See, e.g., *Raber v. Tumin* (1951) 36 Cal.2d 654, 659-661 (*Raber*) [analyzing issue of whether workman's ladder that fell and injured store patron had been toppled by someone else under exclusive control factor]; *Doke v. Pacific Crane & Rigging, Inc.* (1947) 80 Cal.App.2d 601, 606-608 (*Doke*) [same for damages arising from object dropped from

crane].) In accord with this, Noah's alternatively contends that there was insufficient evidence to show its exclusive control of the umbrellas.[4] It bases this contention on evidence that third persons outside its control might have loosened the screw.

This contention ignores the analytical protocol described in the California Law Revision Commission's comments to section 646. Assuming for the sake of discussion that there was sufficient evidence in the record to sustain a finding that third parties had loosened the screw, the trial court was still required to give the res ipsa loquitur instruction so long as there was substantial evidence to support it, leaving it to the jury to determine the facts. We conclude that there was substantial evidence that the umbrella was under Noah's exclusive control, and that Noah's did nothing more than raise contrary evidence on that point.

The umbrellas belonged to Noah's, whose employees were told not to set them up if it were too windy, and, if they were already up, to take them down if it became windy later on. According to store manager Giammichele, Noah's was in charge of the umbrellas, not employees of the shopping center or the shopping center's security guards. Despite Noah's conclusory evidence that someone else could have loosened the screw, this was more than enough to at least permit a finding that the umbrellas were under Noah's exclusive control. (*Doke, supra,* 80 Cal.App.2d at pp. 606-608 [in action by plaintiff injured when object fell from a crane, nonsuit was improper where the crane operator testified the crane was under his exclusive control, even though the defendant contended control was divided among other entities; nonsuit improper "merely because some agency over which the defendants had no control could have caused the accident"].)

Howe, supra, 189 Cal.App.4th at page 1162, supports our conclusion that Ventura presented substantial evidence of Noah's exclusive control over the umbrella. In *Howe*,

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4 Noah's does not contend on appeal that there was insufficient evidence to satisfy either the first requirement – that the accident is of the type that does not usually occur unless someone was negligent – or the third requirement – that the plaintiff was not partly at fault. We therefore deem those issues waived (*Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700), and limit our analysis to the exclusive control requirement.

the plaintiff was injured at the defendant's restaurant when a counter stool broke as he sat on it. In reversing a summary judgment for the plaintiff because the res ipsa loquitur presumption applied, the *Howe* court noted that the stool was clearly in the defendant's exclusive control, which remained in its original condition from the time it was installed. Given Giammichele's testimony that Noah's was in charge of the umbrellas, and that her employees were instructed to take care for windy conditions when using them, we believe Ventura presented enough evidence on this point to take the res ipsa loquitur presumption to the jury. (See *Raber*, *supra*, 36 Cal.2d at pp. 659-661 [where business invitee was struck on head by falling ladder inside defendant's store, possibility that someone else caused the ladder to fall was not enough to take the matter from the jury, and grant of nonsuit was therefore improper]; cf. *Larson v. St. Francis Hotel* (1948) 83 Cal.App.2d 210, 214 [res ipsa doctrine not applicable in action by plaintiff injured when chair was thrown from hotel window during V-J Day celebration because hotels do not have exclusive control over the furnishings inside rooms occupied by hotel guests].)

As for Noah's evidence that someone else might have loosened the screw it was highly speculative and almost completely conjectural. Quan opined, and the trial court concluded, that the two teenage witnesses who laughed when the umbrella hit Ventura might have loosened the screw. Even if such an inference can be reasonably drawn from that fact, it certainly does no more than pose a question for the jury to resolve. The same is true for the notion that other customers' children or dogs were responsible for the screw coming loose. First, even though Giammichele said that children play with the umbrellas and customers tether their dogs to them, she could not say whether such activities had in fact ever caused the screws to come loose. Second, she was not at the Woodland Hills store that day, and there was no testimony that any such conduct occurred. As with the laughing teenagers, this evidence is highly speculative and, at most, gives rise to a jury question concerning the issue of Noah's exclusive control of the umbrellas. Under the applicable rules set forth above, the trial court was obligated to instruct the jury on the res ipsa loquitur doctrine and let it decide the facts.

Noah's contends that even if the instruction should have been given, it was not prejudicial because: (1) the trial court found that different scenarios might have caused the screw to come loose, meaning that proximate cause was not sufficiently established; (2) the wind gust was an unforeseeable act of nature that cut off proximate cause; and (3) the jury was instructed on all the elements of negligence, including proximate cause, and still found it was not liable. These contentions reveal the depths of Noah's misunderstanding of the res ipsa loquitur doctrine. As discussed above, Noah's highly speculative evidence that third parties outside its control caused the screw to come loose did nothing more than permit the jury to determine first whether the res ipsa loquitur presumption arose, and, if so, whether it was dispelled. Even then, a properly instructed jury would have been told it could still infer Noah's negligence from the facts that gave rise to the presumption. Depriving Ventura of the possibility of either the presumption or the inference was prejudicial error. (*Baumgardner, supra,* 144 Cal.App.4th at p. 1392; *Blackwell v. Hurst* (1996) 46 Cal.App.4th 939, 946.)

DISPOSITION

The judgment is reversed and remanded. Appellant Ventura shall recover her appellate costs.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

GRIMES, J.